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No. 784

In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

KENITE CORPORATION

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Court of Claims in this case if, but only if, the petition is granted in No. 709, this Term.

OPINION BELOW

The opinion and findings of the Court of Claims (App. 1–59) [1] are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 6, 1962 (App. 61). Timely motions for rehear-

[1] "App." refers to the appendix to the petition for certiorari filed by the Kenite Corporation in this case, No. 709, this Term. Since the opinion, findings, and judgment of the Court of Claims are all appended to that petition, they have not been reprinted in this conditional cross-petition.

ing were denied on October 3, 1962 (App. 62). The time within which to file a petition for a writ of certiorari was extended to February 1, 1963, by order of the Chief Justice entered January 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the evidence and the findings support the conclusion that the United States has taken an easement to underflood plaintiff's lands.

STATEMENT

Diatomite is a material which, after processing, is used for filter aids, fillers, absorbents, etc. Plaintiff owned in fee or held under lease some 1,055 acres of land in Washington, containing an estimated 1,563,080 tons of diatomaceous earth deposits. It claimed that as the result of the Columbia River Basin project, the reservoir of which is located some 44 to 52 airline miles from plaintiff's property, the deposits were wetted and their commercial value thereby destroyed. The United States denied that it was responsible for the wetting of the deposits. Plaintiff relied upon an expert whose conclusion is summarized in Finding 106 as follows (App. 55–56):

> Dr. Terzaghi's opinion was that the increased moisture content in plaintiff's diatomaceous earth deposits *could have been caused* by water percolating or seeping into deep aquifers exposed in the Equalizing Reservoir * * *

> [causing] a rise in the piezometric surface under plaintiff's diatomaceous earth deposits, and that water rose from the deep aquifers into contact with such deposits and wetted them by capillary action.
>
> Dr. Terzaghi recognized that a watertight barrier seemed to exist to a depth of several hundred feet * * * but *believed* that at greater depths such added water *could have passed* through or under the Coulee Monocline separating the Beezley Hills from the Quincy Basin. [Emphasis supplied.]

The United States presented opposing expert testimony that the wetting came from other causes and Finding 101 recognized that this was, in part, true (App. 51). Two explanations for the wetting offered by the Government were rejected. Plaintiff's original theory, that the wetting resulted from leakage from a canal and its laterals, was affirmatively disproved by the United States, at which point plaintiff was permitted to amend its petition to advance the theory upon which the judgment was based (Finding 7, App. 6–7). Recognizing these facts, the Court of Claims nevertheless held (App. 3):

> Considering the record as a whole, it is reasonable to conclude that the natural consequence of defendant's activities in connection with the Columbia Basin Project resulted in a raising of the piezometric surface of water located beneath plaintiff's diatomite deposits to such an extent that the moisture content of the crude was so increased as to make it uneconomical to process the crude into finished products.

Judge Whitaker dissented, saying, after summarizing the facts and the expert's testimony (App. 4):

> But the burden is on plaintiff to prove that the defendant did wet it. Aside from the speculation of this geologist, we have only the fact that the deposit was not wet before the reservoir was filled with water, and it was wet thereafter. But it is significant that there is no record of the water having been forced up so high at any other place in the 40 or 50 miles between the reservoir and the deposits. At no place did the water rise more than 47 feet, as set out in the trial commissioner's finding 104, and at most places it rose less than 10 feet.

REASONS FOR GRANTING THE WRIT

In the petition in No. 709, the plaintiff in this action seeks review of the adequacy of the compensation awarded for the "taking" found by the Court of Claims. Should that petition be granted, the government would be entitled to, and would, defend the judgment below on the ground, among others, that the finding of a "taking" was in any event not supported by the subsidiary findings or the evidence.[2] Should that defense be upheld, it would logically mean not only that the plaintiff was not entitled to a greater judgment but that the award of $30,000 compensation should itself be set aside. Accordingly, this conditional

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[2] As Judge Whitaker's dissent shows, the conclusion that waters from the reservoir caused the alleged wetting of plaintiff's deposits is based on the mere conjecture of the expert witness that it "might" be the explanation: that it did happen was not offered even as an opinion. Cf. *United States* v. *Causby*, 328 U.S. 256, 268.

cross-petition is being filed in order to protect the government's right to an affirmative judgment in its favor (rather than a mere affirmance of the Court of Claims' judgment) in the event that the petition in No. 709 should be granted.[3]

CONCLUSION

For the reasons stated, this cross-petition should be granted if, but only if, the petition in No. 709 is granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
Attorney.

JANUARY 1963.

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[3] It is being filed also out of an excess of caution to avoid any doubt of the government's right to defend the judgment on the stated grounds against the plaintiff's challenge.